No. 92-1046

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Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL UNION FIRE INSURANCE CO.
OF PITTSBURGH, PA.,

Petitioner,

VS.

JOHN R. CAMP, JR., TRUSTEE,
AND SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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OPPOSITION OF RESPONDENTS TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE SURETY ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Pursuant to Rule 37.4 of this Court, John R. Camp, Jr., the Trustee for the liquidation of Government Securities Corporation ("GSC" or "Debtor"), and the Securities Investor Protection Corporation ("SIPC") submit this opposition to the motion of the Surety Association of America ("the Surety Association") for

permission to file an *amicus curiae* brief in support of the petition for a writ of certiorari in this case.[1] The Surety Association is the second trade group to seek to participate as an *amicus* in this matter. The American Insurance Association ("American Insurance") which, like the Surety Association, has never before appeared in this case, filed a motion, which the Trustee and SIPC opposed.[2] Like American Insurance, the Surety Association raises no relevant matter. By relying on inapplicable bank and thrift statutory and case law, the Surety Association not only confuses the issue, but revisits ground that already has been thoroughly covered by the parties. See National Union Fire Insurance Co. of Pittsburgh, PA. ("NUFIC") Petition for Writ of Certiorari, at 3-21, and Respondents' opposing brief, dated January 15, 1993 ("Opposition to Cert. Pet."), at 6-21. Moreover, the Surety Association seeks to raise new issues relating to the nature of the "property of the estate" in this case which have never been advanced, or considered by any court below. These new issues warrant no consideration, not only because of their untimeliness, but because they involve self-serving characterizations of the property that have no basis in the law.

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[1] Motion for Leave to File Brief *Amicus Curiae* of the Surety Association of America In Support of Petition for Writ of Certiorari, dated January 13, 1993. References herein to the motion shall be to "Surety motion," and to the brief, "Surety brief".

[2] Opposition of Respondents to Motion of American Insurance Association for Permission to File *Amicus Curiae* Brief, dated January 21, 1993 ("Opposition to American Insurance Mtn."). Because a brief overview of this matter is contained at page 2 of that Opposition, it will not be repeated here.

For these reasons, as discussed more fully below, the Surety Association's motion should be denied.

ARGUMENT

1. The Bank and Thrift Cases Are Irrelevant.

The differences in the statutory authority of SIPC and the Federal Deposit Insurance Corporation, and the inapplicability of bank and thrift law to this case have been discussed extensively by the Trustee and SIPC. Opposition to Cert. Pet. at 6-21.[3] The Surety Association sheds no new light on the question, instead devoting much of its argument to the alleged consequences of a failure to uphold the the termination clause. It postulates in that event, that fidelity bond availability "will be diminished to a large extent, if indeed [it does] not vanish from the marketplace altogether." Surety brief at 15. In fact, if the clause is not upheld, insurers might simply increase their premiums. Thus, the long-term effect forecast by the Surety Association is far from certain. More significantly, the impact upon the insurance industry, if any,

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[3] The Surety Association errs in asserting that SIPC requires all brokers to be members of the National Association of Securities Dealers ("NASD"). Surety brief at 2, n.4. In fact, not all brokers that are members of SIPC are also members of the NASD. Brokers or dealers that effect transactions only on a national securities exchange need not register with the NASD. If registration is required, it is pursuant to section 15(b)(8) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(b)(8), and not pursuant to the Securities Investor Protection Act, 15 U.S.C. section 78aaa *et seq.* ("SIPA"). See Opposition to Cert. Pet. at 13.

References hereinafter to SIPA shall be to the United States Code, but for convenience, will omit "15 U.S.C."

is not the concern of this Court. Congress has articulated different policies in the securities and banking areas. While a trustee for a failed broker or dealer may recover under a bond pursuant to section 541(c)(1)(B) of the Bankruptcy Code, 11 U.S.C. §541(c)(1)(B), and SIPA section 78fff(b), a bank receiver or conservator specifically may not, under 12 U.S.C. section 1821(e)(12)(A). See Objection to American Insurance Mtn. at 3-4. If a different policy is to be established with respect to stockbrokers, it is for the Congress, and not the courts, to decide. See *Denver Union Stock Y. Co. v. Producers L.M. Ass'n.*, 356 U.S. 282, 289 (1958) (court should "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy"); *New Jersey v. Anderson*, 203 U.S. 483, 490 (1906) (province of court is to enforce, and not to make, laws); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1161, 1177-78 (E. D. Pa. 1980) (court is not to "become involved in questioning propriety of [law]"). The Surety Association's contentions in this regard simply are irrelevant.

2. The "Property of the Estate" In This Matter Consisted of the Fidelity Bond With All of the Rights Afforded by Law.

Likewise, American Surety's characterizations of the property interest at hand are inaccurate, and raise no issue worthy of review. On the one hand, American Surety asserts that the Debtor's only property interest consisted of a right to the return of any unused premiums and a right to recover on any claims filed prior to the "termination" of the bond. In its view, those rights persisted notwithstanding the debtor's liquidation, and therefore, section 541(c)(1)(B) could

not be deemed to apply. Surety brief at 8-10. Alternatively, American Surety maintains that the only property interest held by GSC was a terminated bond.[4] It contends that section 541(c)(1)(B) would not apply in that situation either, because, in effect, there was no bond of which the Trustee could take possession. *Id.* at 10.[5] Preliminarily, inasmuch as the arguments were never raised or considered below, application of the general rule that federal appellate courts do not review issues not passed upon by the lower courts, is appropriate. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Even assuming, *arguendo*, that the issues had been timely raised, they warrant no consideration because they are clearly without merit.

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[4] In support of its assertion that the standard stockbroker bond (Form 14) has contained a termination clause since 1936, Surety brief at 4-5, American Surety has appended to its brief, sample bonds from 1936 and 1987 (Appendix C and E). It neglects to mention that although the standard bond that was in effect from at least 1970 until 1987, contained a provision terminating the bond upon the taking over of the insured by a liquidator, the bond also authorized the liquidator to purchase an additional period within which to discover any loss, and effectively, to assert a claim. See Opposition to Cert. Pet. at 18-19. Thus, although American Surety seeks to convey the impression that the termination clause contained in the NUFIC bond continuously has been the *status quo*, in fact, for a period of at least 17 years, it was not.

[5] This argument is unavailable inasmuch as NUFIC effectively has conceded, under a stipulation dated October 28, 1989, between the Trustee and it, that a bond exists and that NUFIC is liable under it if section 541(c)(1)(B) ultimately is deemed to apply.

The characterization of the Debtor's interest in the bond, under either alternative proposed by the Surety Association, finds no support in the law. American Surety does not dispute that insurance contracts, such as the one at hand, constitute property of the estate. *See A. H. Robins Co. v. Piccinin*, 788 F.2d 994, 1001-1002 (4th Cir.), *cert. den.*, 479 U.S. 876 (1986); and Surety brief at 8 ("It is a given that a fully paid insurance policy is a valid and binding contract between Petitioner and GSC, and therefore constitutes *property* of the bankruptcy estate.") It is plain that the property interest is not the selective portions of the bond relied upon by American Surety which further NUFIC's interests, but a bond which includes all of the rights in it that are conferred by operation of law. Thus, in asserting that the Debtor's only interest in the bond consisted of premiums and the right to recover under claims filed prior to the "termination" of the bond, American Surety ignores the important property interest which the termination clause would destroy, and which section 541(c)(1)(B) would preserve—the right of the Debtor, so long as the bond has not been terminated, to discover past losses and file claims thereon. This, of course, is the very property interest that is the object of this litigation. By the same token, in asserting alternatively that the Debtor's interest is in a terminated bond, American Surety presupposes that section 541(c)(1)(B) does not apply. Yet, that assumes, before the fact, an answer to the very question that is being resolved.

In the final analysis, by reason of section 541(c)(1)(B) and SIPA section 78fff(b), the property of the estate in this case includes a fidelity bond with an ineffective termination clause. Any other inter-

pretations, such as those advanced by American Surety, ignore the applicable law.

CONCLUSION

For the foregoing reasons, the motion of American Surety Association for permission to file an *amicus curiae* brief should be denied.

Respectfully submitted,

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